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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 304.

SOUTHERN BLOWPIPE & ROOFING COMPANY
and E. J. HOPTON,

Petitioners,

vs.

CHATTANOOGA GAS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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The respondent, Chattanooga Gas Company, for its statement in opposition to the petition for certiorari, respectfully shows the following:

OPINION BELOW.

The original plaintiff, Southern Blowpipe and Roofing Company, filed its complaint in the District Court seeking relief under the provisions of Sections 1 and 2 of the Sherman Act. The District Judge construed the allegations in the complaint as averments of an attempt to monopolize on the part of the defendant, Chattanooga Gas Company, and, on the basis of information contained in depositions and affidavits on file, sustained a motion for summary judgment and dismissed the complaint.

On appeal, the Court of Appeals held that the allegations in the complaint could be construed as allegations

of a present monopoly or monopoly power. That Court, therefore, remanded the case to the District Court in order that the relevant market might be defined, the case tried on its merits, and a determination made in the District Court of whether there was a monopoly or a monopoly power. 360 F.2d 79.

After the case was remanded, the original plaintiff filed an amended complaint, and another plaintiff, E. J. Hopton, filed a complaint. The case was tried before a jury, and the jury found that there was neither a monopoly nor an attempt to monopolize. The two plaintiffs then appealed to the Court of Appeals.

On the second appeal, the Court of Appeals, recognizing that a determination of the case depended upon issues of fact and that those issues had been resolved by the verdict of the jury, did not file an opinion but simply entered an order declaring that there was substantial evidence to support the verdict of the jury and the judgment of the District Court.

JURISDICTION.

1. The respondent, Chattanooga Gas Company, urges that this Court is without jurisdiction for the reason that the determination of the case below depended upon issues of fact which have been resolved by a jury verdict and approved by both the District Court and the Court of Appeals.

2. The respondent asserts that the sole question presented by the petition presupposes or assumes a factual situation which the trial of the case showed to be nonexistent, and that this Court is without jurisdiction to consider a hypothetical question when a ruling would not affect the rights of the litigants.

QUESTIONS PRESENTED.

1. Where the complaints filed in the District Court allege that a company, with a legal franchise to distribute natural gas in the market area, has acquired a monopoly and a monopoly power in the sale and installation of heating and cooling equipment and coin-operated laundry machines, in violation of Section 2 of the Sherman Act, and these issues are presented to a jury under a full and fair charge, and the jury returns a verdict specifically finding that the company has neither a monopoly nor has attempted to monopolize in such selling and installing, and both the District Judge and the Court of Appeals find that the jury's verdict is supported by adequate evidence, is a substantial question under the antitrust laws presented for consideration by this Court?

2. Where a legal question raised by the plaintiffs in the District Court and the Court of Appeals presupposed or assumed a factual situation which a trial of the case showed not to exist, and for that reason neither the District Court nor the Court of Appeals ruled on the question, will this Court consider such a hypothetical question when a ruling would not now affect the rights of the litigants?

3. Where a company is engaged in the business of distributing natural gas, in an area in which electric power, generated and distributed by governmental agencies, is so plentiful and cheap and its use is so widespread that the area is known as "the electric center of the world," and where competition for a gas distributing company is considered more difficult than any other locality in the nation, is it a violation of Section 2 of the Sherman Act for such company to sell and install heating and cooling equipment and coin-operated laundry machines, at a profit, for the purpose of promoting the sale of natural

gas, and a jury has found that the company has neither acquired nor attempted to acquire a monopoly or a monopoly power in the sale and installation of such equipment?

STATEMENT OF THE CASE.

1. The Pleadings, the Trial, and the Judgments of the District Court and the Court of Appeals.

On January 7, 1964, Southern Blowpipe & Roofing Company, which will be referred to as Southern, filed its complaint against the Chattanooga Gas Company, alleging that the Gas Company was selling and installing *gas* appliances and equipment below cost, in competition with Southern and others, and that such activity tended to create a monopoly and that it rendered competition in selling impossible. (Appendix A, 29.) In its answer, the Gas Company denied the allegations and averred that it was selling gas appliances and equipment at competitive prices for the purpose of promoting the sale of natural gas. (Appendix B, 30.)

On the Gas Company's motion for summary judgment, the District Judge held that the complaint alleged, not a present monopoly, but an attempt to monopolize. The depositions and affidavits on file clearly showed that it was manifestly to the advantage of the Gas Company to have as many dealers as possible selling gas appliances and equipment and that there was no possible reason why the Gas Company would want to curb such sales by other dealers. The District Judge held that an attempt to monopolize required specific intent and that there was no evidence of such intent. He, therefore, sustained the motion and dismissed the suit. (Appendix C, 34.)

Southern then made its first appeal to the Court of Appeals. That Court was concerned, not by any novel

question raised by Southern on the appeal, but by the vague and ambiguous wording of the complaint. The Court held that the complaint could be construed as alleging a present monopoly or monopoly power rather than an attempt to monopolize, as found by the District Judge. The Court of Appeals, therefore, remanded the case in order that the relevant market might be defined, the case tried on its merits, and a determination made in the District Court of whether there was a monopoly or a monopoly power. 360 F.2d 79.

After the case was remanded, Southern elected not to proceed on its complaint. Instead, it filed an amended complaint in which it substantially changed the nature of its cause of action. It averred that the Gas Company had a legal monopoly in the sale and distribution of natural gas in the area and that by virtue of such fact it had acquired a monopoly and monopoly power, not in the sale and installation of *gas appliances and equipment,* as alleged in the first complaint, but in the sale and installation of *heating and air conditioning systems* generally. (Appendix D, 38.)

E. J. Hopton, who will be referred to as Hopton, filed a complaint similar to Southern's amended complaint, but referring to coin-operated laundry machines instead of heating and air conditioning systems. (Appendix E, 40.)

At the pretrial hearing, the District Judge defined the relevant market. It was determined that the geographic area involved was the City of Chattanooga and the adjacent territory in which the Gas Company distributes natural gas. The products and activities involved were the selling and installing of heating and air conditioning systems (1) in the residential market, (2) in the commercial market and (3) in the light industrial market, and (4) the selling and installing of coin-operated

laundry machines. The pretrial order did *not* limit the market to gas-operated equipment. (Appendix F, 42.)

The pretrial order provided that there were two principal issues of fact to be determined by the jury: (1) whether the Gas Company had violated the antitrust laws by monopolizing the sale and installation of the mentioned products in the several markets and, if not, (2) whether the Gas Company had attempted to monopolize such markets.

After a full hearing of the evidence at the trial, the District Judge charged the jury on Southern's contentions that the Gas Company was selling and installing below cost and that the company's ability to indulge in such practice was possible because it had a legal monopoly to distribute natural gas in the area and could absorb its losses in its general operating expenses. (Appendix G, 43.)

The District Judge's instructions were full and complete. He defined the offense of monopolizing, and explained that only general intent was required. He defined the offense of attempting to monopolize and explained that specific intent was required. After the jury had been deliberating nearly two hours, its members returned to the courtroom, and the foreman requested additional instructions on the offense of attempting to monopolize. The District Judge again explained that only a general intent was required in monopolizing and that a specific intent was required in an attempt to monopolize, and emphasized that the jury should bear in mind all of the instructions previously given on all phases of the case. (Appendix G, 49.)

In its verdict the jury found that the Gas Company was not guilty of monopolizing and also that it was not guilty of attempting to monopolize. (Appendix G, 51.)

Southern, together with Hopton, then appealed to the

Court of Appeals for the second time. Neither plaintiff raised any question as to the sufficiency of the evidence to support the verdict of the jury. Because the decision of the principal legal questions depended upon the factual issues, and those issues had been resolved adversely to the plaintiffs' contentions by the verdict of the jury, the Court of Appeals did not write an opinion, but simply entered an order declaring that there was substantial evidence to support the verdict of the jury and the judgment of the District Court.

In their petition to rehear, Southern and Hopton said: "The appeal in this case did not question the propriety of the jury verdict—did not contend that there were inadequate facts to support that verdict." The Court of Appeals denied the petition to rehear.

2. The Facts.

Neither Southern nor Hopton introduced a scintilla of evidence to prove the total volume of commerce in the relevant market, the percentage of that volume held by them, or the percentage of that volume affected by the Gas Company's activities.

As to the *residential market,* the evidence introduced by the Gas Company showed that in 1966 the sales by other dealers of electrical appliances and equipment amounted to $20,185,677. (Appendix H, 53.) During the same period, the Gas Company's sales of all types of gas burning equipment and appliances for all purposes amounted to only $702,000. (Appendix I, 55.) The Gas Company's sales of all equipment were thus 3.5% of the sales of electrical equipment for residential use only.

In the *commercial market,* for the period extending from July, 1963 to the date of trial, the Gas Company had sold and installed only 7.7% of the gas equipment, as

measured on a volume-intake basis. (Appendix J, 57.) As to the light *industrial* market, the evidence showed that this work is done according to plans and specifications, and that the Gas Company only rarely seeks such jobs. Southern admitted that the Gas Company is not even in competition with it in that market. (Appendix K, 57.)

As to the *coin-operated laundry machine market,* the evidence showed that the one sale Hopton claimed to have lost to the Gas Company occurred in 1959, more than four years prior to the filing of the suit, and that that single sale was lost because Hopton's company would not approve the proposed credit arrangement. (Appendix L, 59.)

The *geographic market* involved in this suit is the City of Chattanooga and adjacent areas. It is in the heart of the area served by the Tennessee Valley Authority. Electricity is so cheap, its supply so plentiful, and its use so widespread that the city is known as the "Electric Center of the World." (Appendix M, 62.) In 1966 the Chattanooga Electric Power Board had more than 82,000 residential customers, and of these 60% were heating their homes electrically. Ninety-eight per cent of the residential customers had electric refrigerators, 89% had electric water heaters, and 97% had electric ranges. (Appendix H, 53.) This cheap electric power was made available in the area in the 1930's.

Up until 1950 the Gas Company was a small company which distributed manufactured gas produced by coke ovens. Only some 3,000 to 4,000 homes in the area were heated by gas. (Appendix N, 68.) The company could not possibly compete with the sale of cheap electric power. In 1950, for the first time, natural gas became available in the market area. In an effort to gain acceptance of this new fuel, the Gas Company tried to persuade as many dealers as possible to sell gas appliances and equipment.

(Appendix N, 68.) The dealers made many sales and did well until 1953, at which time the market had become saturated and post-war demands had been met. Gas heating sales decreased for Southern and for all other dealers. (Appendix O, 76.)

The real demand was for electrical appliances and equipment, and the dealers lost interest in the sale of gas equipment. From 1954 to 1960, the Gas Company made no progress in its efforts to expand the use of natural gas, and by 1960, the beginning of the period covered by this suit, the company was actually losing customers. Since other dealers and contractors showed little interest in the market, the Gas Company was compelled to step up its efforts and try to gain the permission of builders of new homes to lay gas lines in subdivisions, and to install gas heating and cooling equipment. (Appendix O, 76.) The company's efforts met with some success, and as its sales and installations increased in volume, other dealers and contractors again became interested in the gas market. The Gas Company was pleased, and referred as many jobs as possible to other dealers and contractors. (Appendix P, 79.)

The Gas Company purchases its supply of gas on a demand-commodity basis. The demand charge is paid for the privilege of being able to take from the pipeline a certain number of cubic feet of gas during a certain period. This is a fixed charge, and is payable regardless of whether the company uses the amount of the demand. The second element is the commodity charge, at a much lower rate, which is based on the amount of gas the company actually uses. (Appendix M, 64.)

The amount of the load on the company's lines is a vital factor in determining the rate that can be charged the ultimate consumer. This is true because of the fixed

charges under the demand rate. If the company could sell the maximum number of cubic feet of gas which it has the privileges of taking from the pipeline, the gas would cost less per unit, and the rate to the ultimate consumer would be lower.

The only way natural gas can be used is by gas-burning equipment. It is to the company's advantage to have as many dealers and contractors selling as much gas-burning equipment as possible. It has assisted other dealers by helping them make sales, conducting contests and giving them prizes and bonuses, furnishing them free engineering services, conducting schools to teach them and their employees how to sell and install equipment, and by selling equipment to them at cost plus a small handling charge. (Appendix O, 71.)

Any customer, or prospective customer, on the gas lines, also has available electricity, oil, and coal. He is not required to use gas. He also has the privilege of using any combination of the several fuels for heating and cooling. As a public utility, the Gas Company must furnish gas to all persons desiring it, regardless of where or from whom they purchase their equipment. (Appendix N, 71.)

The Gas Company, in promoting the sale of natural gas, follows the prevailing practices in the market area. Oil companies sell and install oil-heating equipment to promote the sale of oil. (Appendix Q, 80.) The Chattanooga Electric Power Board, although it does not sell and install electrical equipment, promotes such sales for dealers and contractors by furnishing free engineering services, obtaining bids for prospective uses of electricity, and by making cash allowances to new customers in apartment projects. (Appendix R, 81.)

The reasonableness of the promotional expense of a company is measured by the ratio of the expense to the total sales of the company. The average range in the United States is from 3% to 3.85%. The Gas Company's promotional expense has varied from 2.5% to an occasional 3.5%, and is considered reasonable by experts in the field. (Appendix M, 61.)

The Gas Company figures all jobs at a profit, and never intentionally figures any job at a loss. In making its estimates, the company includes the cost of the equipment, the freight, the expense of the transportation of the equipment to the point of installation, materials and labor, and the cost of any work sub-contracted. To the sum of these items is added a percentage to cover overhead and profit. (Appendix O, 75.)

The Gas Company is regulated by the Tennessee Public Service Commission, and is required to keep its books in accordance with the uniform system of accounts, devised by the National Association of Railroad and Utilities Commissioners. This system of accounts is designed to reflect the operations of the company as a gas distributing company. The accounting system treats appliances and equipment sales as part of the company's activities in promoting the sale of natural gas. (Appendix M, 59.)

Some of the company's expenses are definitely chargeable to the sale of natural gas. Still other expenses are properly chargeable to the sale of appliances and equipment. But the system of accounts provides no guidelines for apportioning expense that is chargeable to both the sale of gas and the sale of equipment. For instance, an advertisement urging the public to "cook with gas" promotes the sale of gas and the sale of appliances. The company's salesmen are paid on the basis of the gas-consuming volume of the equipment instead of on the basis of the

dollar value of the sale. The allocation of such expenses is left to the judgment of the accountants. (Appendix M, 60.)

Southern, in an attempt to support its allegation that the Gas Company sells and installs equipment below cost, introduced excerpts from reports made by the company to the Tennessee Public Service Commission. These excerpts contain figures based on apportionments made by the company under the uniform system of accounts. They are not profit and loss statements on merchandising.

The Gas Company, in reporting its total promotional expense, *as a gas company*, allocated roughly 48% of its total sales expense to the cost of making merchandise sales. From a merchandising standpoint, this was not a proper allocation, and presents a distorted picture of its merchandising operations.

The approved method, from a merchandising standpoint, of allocating those expenses cannot be directly charged to either the distribution of gas or the sale and installation of equipment, is to do so by using the ratio that the volume of merchandise sales bears to the total volume of sales. This ratio, in the Gas Company's business, is approximately 7%. (Appendix M, 63.)

When the total selling expense is properly allocated on the basis of the approved ratio, the company's merchandise sales for the past ten years show a new profit. (Appendix I, 55; Appendix M, 65.)

I. NO SUBSTANTIAL QUESTION UNDER THE ANTITRUST LAWS IS PRESENTED BY THE PETITION.

The petitioners ask this Court to review a jury verdict which has been approved by the District Judge and the Court of Appeals. The thrust of the complaints was that the Gas Company was guilty of monopolizing or attempting to monopolize. After a full trial the jury rejected this contention. This Court has said repeatedly that it will not review the verdict of a jury and the concurrent findings of fact by two lower courts.

A. The Complaints Averred a Violation of Section 2 of the Sherman Act.

Southern's original complaint averred that:

> "The defendant * * * sells and installs * * * appliances and equipment at prices and on terms below * * * cost * * *, rendering competition impossible. In addition, the defendant is the distributor * * * for Arkla-Servel * * * equipment, and supplies it directly to consumers at less than cost, or at no charge or on such terms as are unfair and below cost. All of which * * * tends to create a monopoly." (Appendix A, 29.)

Southern's amended complaint averred as follows:

> "The defendant sells, installs * * * heating and air-conditioning systems in competition with the plaintiff * * *, and sells and installs such systems at prices and on terms below * * * cost * * * rendering competition in the sale, installation and servicing of such systems impossible."
>
> * * * * *
>
> "Competition, therefore, between the plaintiff * * * and the defendant no longer exists, because of the present monopoly power being exercised by the defendant * * *." (Appendix D, 38.)

Hopton's Complaint averred as follows:

> "The Chattanooga Gas Company maintains a monopoly * * * in the sale of natural gas in the Chattanooga area. The monopoly power * * * was the enabling factor in the complete suppression of competition in the market for coin-operated laundries * * * in and around Chattanooga. This extension of the monopoly * * * was and is a violation of the Antitrust Laws of the United States * * *." (Appendix E, 40.)

The meaning of the phrases "rendering competition impossible," "competition no longer exists," "the complete suppression of competition," and "tends to create a monopoly" is that the plaintiff averred that the Gas Company had a present monopoly, a monopoly power, or had attempted to monopolize.

B. Monopoly Power in the Relevant Market Is an Essential Element of a Section 2 Violation.

One of the principal elements of a Section 2 violation is the possession of monopoly power.

In *United States vs. Grinnell Corporation,* 384 U.S. 563, at pages 570-571, the Court defined the offense as follows:

> "The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) The possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

C. The District Judge Correctly Charged the Jury.

The District Judge gave a full and fair charge to the jury.

He submitted two issues to the jury: (1) Whether Southern was entitled to recover from the Gas Company for a monopolization in violation of the Sherman Act, and if not, (2) whether Southern was entitled to recover from the Gas Company for an attempt to monopolize in violation of the Sherman Act.

The charge covered the nature and elements of the offenses, the subject of intent, and the contentions of the parties.

1. The Elements of the Offense.

In charging on the issue of *monopolizing*, the District Judge used almost the exact language used by this Court in defining the offense in *United States vs. Grinnell Corporation*, 384 U.S. 563, at pages 570-571. He also defined the offense of attempting to monopolize. (Appendix G, 44.)

2. The Subject of Intent.

On the subject of intent in *monopolizing*, the District Judge stated to the jury;

> "When we speak of intent or purpose to use monopoly power as an essential element of monopolization, we speak of a general intent and not specific intent. To satisfy the requirement of intent to use monopoly power, it is not necessary that the defendant have had the specific intent to establish a monopoly or to destroy competition. The require (sic) intent or purpose is present if monopoly results as the necessary consequence of what was knowingly and intentionally done. When the monopolization has been accomplished, the intent required is only the general intent or the general purpose to do the act which results in a monopolization." (Appendix G, 45.)

In charging on the issue of an *attempt to monopolize*, the District Judge stated that specific intent was required, and then clearly explained the difference between general intent and specific intent as applied to the two possible situations:

> "While only a general intent is necessary to show monopolization, where the charge is attempt to monopolize, the intent shown must be specific intent to gain control over the relevant market and to exclude competitors from that market. The specific intent required to show an attempt to monopolize is a specific subjective intent to gain a monopoly or to destroy competition." (Appendix G, 46.)

When the jury, after beginning its deliberations, returned to the courtroom and requested additional instructions on the subject of intent, the District Judge again explained the law, expressing the rule in almost the identical language he had used in the main charge. He then cautioned the jury to bear in mind all of the instructions on all phases of the case he had given it. (Appendix G, 49.)

3. The Contentions of the Parties.

The District Judge specifically charged the jury on Southern's contention that the Gas Company was selling and installing below cost, rendering competition impossible, and that Southern contended such practice was possible because the Gas Company had a legal monopoly to distribute natural gas in the area. (Appendix G, 44.)

D. The Jury Found That No Monopoly Power Existed.

The jury found that Southern was not entitled to recover from the Gas Company for either a monopolization or an attempt to monopolize, in violation of the Sherman Act. (Appendix G, 51.)

E. The Verdict of the Jury Was Approved by the District Judge and the Court of Appeals.

The District Judge entered an order, based on the jury's verdict, dismissing Southern's action. He overruled the plaintiffs' motion for a judgment in their favor notwithstanding the verdict. (Appendix S, 81.)

On the appeal to the Court of Appeals, neither plaintiff raised any question as to the sufficiency of the evidence to support the verdict of the jury.

Because the decision of the principal legal questions raised by Southern and Hopton depended upon the factual issues, and those issues had been resolved adversely to the plaintiffs' contentions by the verdict of the jury, the Court of Appeals did not write an opinion but simply entered an order declaring that there was substantial evidence to support the verdict of the jury and the judgment of the District Court.

In their petition to rehear, Southern and Hopton stated that they did not contend that there were inadequate facts to support the verdict.

The rule is well-settled that the decision of a lower Court must be affirmed if the result is correct, even though the court relied upon a wrong ground or gave a wrong reason. *Sec. & Exch. Com. vs. Chenery,* 318 U.S. 80; *Brown vs. Allen,* 344 U.S. 443.

The Court of Appeals was not required to consider each and every question raised by Southern and Hopton. It fully performed its duty, which was to determine whether the judgment of the District Court was correct.

F. It Is Against the Policy and Practice of This Court to Review the Concurrent Finding of Fact by Two Lower Courts.

The plaintiffs below alleged that the Gas Company was violating Section 2 of the Sherman Act in that it was exercising a monopoly power in selling and installing heating and cooling equipment. The District Judge gave the jury a full and fair charge on the issues. The jury found that there was no monopolizing by the Gas Company. Will this Court now review the jury's verdict, which has been approved by two lower courts?

In *Lavender vs. Kurn,* 327 U.S. 645, at pages 652-653, this Court said:

> "* * * Under these circumstances, it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses and arrive at a conclusion opposite from the one reached by the jury."

Two lower courts have determined that there is adequate evidence to support the jury's verdict. In *Graver Tank & Mfg. Company vs. Linde Air Products Company,* 336 U.S. 271, at page 275, this Court said:

> "A court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious error and exceptional showing of error."

There is no obvious error in the jury's verdict. In fact, the petitioners here, in their petition to rehear in the Court of Appeals, said, in effect: We do not contend that the evidence before the jury was inadequate to support the verdict.

The policy followed by this Court is sound. In *Berenyi vs. District Director, Imm. & Nat. Serv.*, 385 U.S. 630, at page 636, the Court said:

> "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force."

The jury, by its verdict, has found that the essential element of "monopoly power" does not exist. The two lower courts have concurred.

No substantial question under the antitrust law is presented by the petition.

II. THE PETITIONERS SEEK AN ADVISORY OPINION BECAUSE THE QUESTION PRESENTED IS HYPOTHETICAL.

This Court has long held that it will not consider abstract, hypothetical, or contingent questions. *Alabama State Federation of Labor vs. McAdory*, 325 U.S. 450, at page 461.

Southern and Hopton alleged that the Gas Company was violating Section 2 of the Sherman Act by monopolizing the selling and installing of heating and cooling equipment in the Chattanooga market. The jury, by its verdict, held that this allegation was untrue. The two lower courts concurred. The petitioners, in their petition to rehear in the Court of Appeals, stated that they did not question the sufficiency of the evidence to support the jury's verdict.

The question posed by the petition is this:

> "Forget that there has been a finding of fact by the Court and jury, and suppose there should sometime be a gas distributing company that acquired a monopoly or monopoly power in the sale and installation of heating and cooling equipment, would this be a violation of Section 2 of the Sherman Act?"

The question must necessarily be phrased in this manner because this is a Section 2 case, and one of the essential elements of the offense is monopoly power in the relevant market. *United States v. Grinnell Corporation,* 384 U.S. 563, at pages 570-571. No such monopoly power was found to exist in this case.

This Court is asked to make a ruling on a legal question based on a factual situation which does not exist in this case. Thus, the petitioners are actually asking for an advisory opinion.

In an effort to present a real, instead of a hypothetical question, the petitioners assert that in 1966 the Gas Company installed gas heating and cooling systems in 140 out of 300 new homes constructed in the relevant market. This in itself is hypothetical because neither Hopton nor Southern compete in this market. Hopton was engaged in selling and installing only coin-operated laundry machines. Southern had never even attempted to break into the new home market. (Appendix R, 80; Appendix T, 82; Appendix U, 82; Appendix V, 82.) Southern's president testified as follows:

> "Q. You've never approached them and tried to work with them on developing new subdivisions going electric or gas?
>
> A. No, sir."

This Court will not consider abstract or hypothetical questions.

In *Amalgamated Ass'n., Etc. vs. Wisconsin Employ. Rel. Bd.*, 340 U.S. 416, at page 418, this Court said:

> "A Federal Court is without power * * * to give advisory opinion which cannot affect the rights of the litigants in the case before it."

Again, in *Local No. 8, Oil, Chem. & Atom. Workers vs. Missouri,* 361 U.S. 363, at page 367, the Court said:

> "* * * the duty of this Court 'is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions * * * upon abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue before it.' "

The question is hypothetical and abstract, and its determination by this Court cannot affect the rights of the litigants.

III. THE RELIEF SOUGHT BY THE PETITIONERS WOULD REQUIRE THIS COURT TO AMEND SECTION 2 OF THE SHERMAN ACT BY JUDICIAL DECREE.

Under the present law, there is no relief which this Court can grant the petitioners. The type of relief they seek is legislative in nature. The petitioners admit, in effect, that the Gas Company has no monopoly or monopoly power. Nevertheless, they insist that the company is in some manner prohibited by the anti-trust laws from selling and installing heating and cooling equipment, at a profit, for the purpose of promoting the sale of natural gas.

A. The Principal Element of the Offense Under Section 2 of the Sherman Act Does Not Exist in This Case.

Section 2 of the Sherman Act provides as follows:

> "2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade

or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

In *United States vs. Grinnell Corporation,* 384 U.S. 563, at pages 570-571, this Court said that one of the two essential elements of the offense of monopoly under Section 2 of the Sherman Act is:

"* * *(1) the possession of monopoly power in the relevant market * * *."

The jury and the two lower Courts have found that there is no monopoly in this case. This Court will not now consider that issue.

If there is no violation of Section 2, this Court is without authority to grant relief.

B. The Sherman Act Does Not Prohibit Necessary and Reasonable Promotional Activities.

This Court has long recognized the right of a gas distributing company to promote the sale of its product. In *West Ohio Gas Company vs. Public Utilities Commission of Ohio,* 294 U.S. 63, at page 72, the Court, speaking through Mr. Justice Cardozo, said:

"* * * We take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity. A business never stands still. It either grows or decays. Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others * * *."

Certainly the Gas Company has the right "within the limits of reason" to promote the sale of natural gas in an area where electricity is so cheap and plentiful and its use so widespread that the locality is known as "the electric center of the world," and where it is recognized

that competition for a gas company is greater than any area in the nation. (Appendix M, 62.)

"The antitrust laws do not require a business to cut its own throat." *Brown vs. Western Mass. Theatres, Inc.*, 288 F.2d 302, at page 305.

In selling and installing gas burning equipment, the Gas Company is following the customary practice in the market area. Oil companies in the area sell and install oil-heating equipment to promote the sale of oil. (Appendix Q, 80.) The Chattanooga Electric Power Board promotes the sale of electric power by providing free engineering services to dealers in electrical equipment, awarding prizes to new home builders who install electrical equipment, obtaining bids from contractors for prospective users of electricity, and by making cash allowances to new customers in apartment projects. (Appendix R, 81.)

The reasonableness of the promotional expense of a company is measured by the ratio of the expense to the total sales of the company. The average range for promotional expenses by public utilities in the United States is 3% to 3.85%, depending upon the competitive market. Over the years, the Gas Company's promotional expense has run from 2.5% to 2.7% and occasionally 3% to 3.5%. This percentage is considered reasonable by experts in the field. (Appendix M, 62.)

The company's promotional activities are necessary, lawful, and reasonable.

C. Price Reduction For Valid Business Purposes Is Not a Violation of Section 2 of the Sherman Act.

Southern's allegation that the Gas Company sells and installs equipment below cost is based, not on evidence of any specific sales, but on excerpts from reports made by the Gas Company to the Tennessee Public Service Com-

mission. These reports are not profit and loss statements of the company's merchandising activities.

The Gas Company, like all gas distributing companies in Tennessee, is required to keep its books in accordance with the uniform system of accounts. This system is designed to reflect the company's operations as a gas distributing company. The accounting system contemplates that appliances and equipment will be sold, but treats such sales as part of the company's activities in promoting the sale of gas. (Appendix M, 61.)

The Gas Company, in reporting its promotional expenses to the Tennessee Public Service Commission, erroneously allocated 48% of its total promotional expense to its merchandising activities. This, of course, tended to indicate that the company was selling appliances and equipment at a loss. Under approved accounting procedures, the company should have allocated to merchandising approximately 7% of the total promotional expense, because its merchandise sales account for only 7% of its total sales as a gas distributing company. (Appendix M, 63.)

When the total selling expense is properly allocated on the basis of the approved ratio, the merchandise sales for the period of the last ten years show a net profit. (Appendix I, 55.)

The Gas Company does not sell and install equipment at a loss. (Appendix O, 75.)

The fact that the Gas Company is a public utility does not prohibit it, under the provisions of Section 2 of the Sherman Act, from selling in the market at competitive prices.

Price reduction in a competitive situation is a lawful practice.

In *Schine Chain Theatres vs. United States*, 334 U.S. 110, at pages 120 and 121, this Court said:

> "There is also challenge to the findings that Schine cut admission prices. This seems uncontroverted. But price cutting without more is not a violation of the Sherman Act. It is indeed a practice which this record shows to have been common in the industry. It may be used in violation of the Act. Thus it may be the instrument of monopoly power to eliminate competitors or to bring them to their knees. But since it is not unlawful per se, facts and circumstances must be adduced to show that its purpose or effect was employed as an instrument of monopoly power. Here there is nothing except a bare finding that at times Schine cut admission prices. That finding is not sufficiently discriminating to withstand analysis and is not adequate to support an injunction against price cutting."

See *Gold Fuel Service, Inc. vs. Esso Standard Oil Company*, 306 F.2d 61, cert. den. 371 U.S. 951.

This Court has specifically held that even sales below cost are not condemned if they are made in furtherance of a legitimate commercial objective, because in such case there could be no "predatory intent." *U. S. vs. National Dairy Products Corp.*, 372 U.S. 29. In that case the Court referred with approval to the holding in *Ben Hur Coal Company vs. Wells*, 242 F.2d 481, 486, where the Court of Appeals said:

> "* * * it is not within the scope or purpose of the antitrust laws to protect a business against loss in a competitive market. * * * One who reduces his prices in defense of his economic life cannot be guilty of eliminating competition or his competitors."

The Gas Company's sole purpose in selling appliances and equipment is to promote the sale of natural gas. (Ap-

pendix N, 68.) No reason had been, or can be, suggested why the company could possibly want to eliminate, or in any manner curb, the activities of other dealers and contractors. Its price reductions have been made for a valid business purpose.

The petition does not present a case in which this Court could grant relief under the present antitrust laws.

D. The Relief Sought by the Petitioners Is Legislative in Nature.

The effect of the petition is to ask this Court to hold that it is a violation of Section 2 of the Sherman Act for a gas distributing company to sell and install heating and cooling equipment, at a profit, for the purpose of promoting the sale of natural gas in a highly competitive fuel market, even though the company has neither a monopoly nor a monopoly power.

Stated differently, the petitioners seek to have this Court hold that a gas distributing company cannot compete with other dealers and contractors in selling and installing appliances and equipment. Only Congress could grant such relief.

The purpose of the Sherman Act is to encourage competition—not to curb it.

This Court will not amend the Sherman Act by judicial decree.

CONCLUSION.

The petitioners, with great zeal, ask this Court to adjudicate what they describe as a new question of national importance and vital to the future administration of the antitrust laws. The factual situation on which the question is based was found by the jury not to exist. The verdict of the jury was approved by the District Judge and

the Court of Appeals. Therefore, the Court is being asked to adjudicate a hypothetical question.

The real insistence of the petitioners is, not that a monopoly power exists, but that a gas distributing company should not be permitted to compete with other dealers and contractors, on any terms, in the sale and installation of heating and cooling equipment. To so hold would be to read into the Sherman Act a prohibition that it does not contain. The result would be to discourage competition, and this would defeat the very purpose of the Act.

The petition should be denied.

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CERTIFICATE OF SERVICE.

I, JACK WILSON, one of the attorneys for the respondent, Chattanooga Gas Company, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ____day of ____ ,1968, I served copies of the within brief for the respondent on Southern Blowpipe & Roofing Company and E. J. Hopton, the petitioners, by mailing said copies in duly addressed envelopes, postage duly prepaid, to their counsel of record, namely: Sizer Chambliss, 400 Pioneer Building, Chattanooga, Tennessee, and John I. Foster, Jr., 202 Maclellan Building, Chattanooga, Tennessee.

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